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EXAMINER	
RUHL, DENNIS WILLIAM	
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3689	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	09/853,196	HAJDUKIEWICZ ET AL.	
	Examiner	Art Unit	
	Dennis Ruhl	3689	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *18 February 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *31,38-41,55,61,65-68 and 115* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *31,38-41,55,61,65-68,115* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Applicant's response of 2/18/09 has been entered. The examiner will address applicant's remarks at the end of this office action.

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 31,38-41,55,61,65-68,115, are rejected under 35 U.S.C. 103(a) as being unpatentable over McCall et al. (6321984) in view of "Infinity" and further in view of "Weather futures bet will give Tucson forms a hedge against loss".

For claims 31,55,61,115, McCall discloses a system and method for selling vehicle fuel to customers. The vehicle fuel is inherently going to be sold at a price and that price is necessarily going to be decided upon by the operator of the retail establishment that is selling the vehicle fuel, this will be explained in more detail later. McCall discloses that fuel can be sold to consumers at discounted prices by using various types of incentives and/or customer loyalty types of programs. In column 4, lines 12-23, it is disclosed that the system of McCall includes a database 40 that contains records pertaining to its customers. It is disclosed "*For example, the store may be a member-oriented retail outlet, and a record for each customer indicates that the customer is a member and a "level" of benefits or privileges that the customer may receive. One level may indicate a first discount to the customer of the goods he purchases while another level may indicate a second discount.*" The database 40

stores the information regarding the type of discount that the customer is entitled to and the relevant information pertaining to their participation in the loyalty program they are enrolled in. Example C discloses a situation where a customer is entitled to certain benefits that result in a 10 cents per gallon discount. McCall also discloses that a discount can be given for fuel based on the whether or not the customer has purchased items for a pre-selected group, exceeds a certain threshold (**quantity** or dollar amount), made purchases on certain dates, etc.. McCall recognizes that there may be more than one type of action that would trigger a discount and that there can be differing levels of discounts given to a given customer. The disclosure indicates that the specific conditions of the loyalty program can vary and are selected as desired by the retail operator. McCall is directed to an overall teaching of providing discounts for fuel purchases and this includes a discount given for the purchase of certain quantities being achieved. **The claimed receiving of "*program sponsor data that includes an amount of a finder's fee paid by a program sponsor*" is considered to be the discount amount that the customer is entitled to for the some various programs discussed by McCall**, that is disclosed as being paid or subsidized by a third party (a program sponsor). With respect to the language about the fee being paid by a program sponsor, applicant is referred to column 12, lines 19-30, where it is disclosed that "*Pertaining to the discounts, a variety of arrangements are contemplated. Some examples entail the funding of the discount or reward by third parties other than the supplier of petroleum*". If a third party is funding the discount, the fee that they pay can very reasonably be considered a "finder's fee". The discounted amount for fuel

purchases is paid to the program operator by the program sponsor (the third party) to more or less subsidize the discount that is given to the customer. **The claimed step of receiving program sponsor data is the receipt of the information relating to the discounts given to customers and the amounts of those discounts paid by a program sponsor (the third part discussed in column 12).**

For claim 115, in addition to that already addressed above, **the claimed language of "on *establishment of an affinity relationship between the program sponsor and the customer*", this is taken as being directed to non-functional descriptive material**. The limitation claimed is the receiving of program sponsor data that includes an amount of a fee (just a number). The language about when the fee was paid does not further add anything to the claimed step of receiving the program sponsor data. The timing of the paying of the fee is not given full weight because the only step actually claimed is the receipt of the information. The rest of the language regarding the fee is directed to non-functional descriptive material.

Not disclosed is receiving *customer expected fuel usage data* that includes an *expected quantity* of fuel to be *purchased over a number of months* during which a *fixed guaranteed program price* will be given to the customer. Also not disclosed is the act of using the customer expected usage data along with the program sponsor data (subsidized discount given to customers) to determine a *guaranteed fixed program price* for fuel, by using a processor.

McCall also does not disclose using the usage data and sponsor fee amount (data related to a fee to be paid by a third party) to develop *a financial hedging strategy* that can diminish the risk associated with the volatility of fuel prices.

With respect to having and receiving "*customer expected usage data*" that includes a quantity of fuel to be purchased over a given number of months, "Infinity" discloses what are known as energy future contracts. The reference specifically discloses that with respect to heating oil for homes, it is known to provide customers with guaranteed fixed program prices for their "annual consumption of fuel". This is done to some risk management control over the volatility of oil prices, as is discussed in the reference. **The *expected quantity of fuel to be purchased* is disclosed as the "annual consumption" that the user is going to consume**. This is decided at before the year actually has occurred. **The *number of months* is over a 12 month period as is indicated by the use of "annual consumption". The price that the customer receives is a *customer specific fixed guarantee program price* as claimed. The reference even refers to the customer price for heating oil as a *guaranteed* delivery price**. With respect to providing McCall with a fixed guaranteed fuel program price over a given number of months, this would have been obvious to one of ordinary skill in the art. This is essentially taking the concept of providing a fixed guaranteed program price for heating oil and providing this feature to the loyalty program of McCall where vehicle fuel is disclosed. This is just another way one can structure the discount system and loyalty program of McCall with respect to quantity thresholds, one can do what Infinity teaches which is provide the customer with a

guaranteed fixed price for their annual consumption of fuel. One of ordinary skill in the art would recognize that the two can be combined together and one would expect that the results obtained in Infinity would also be expected to be obtained in McCall. Additionally, the technical expertise exists to combine the two which amounts to nothing more than using the guaranteed program price of Infinity in the customer loyalty program of McCall where the customer of McCall can receive an annual guaranteed fixed price for their annual fuel consumption. Claiming in a combination that which was previously known separately, where the results are predictable, is obvious to one of ordinary skill in the art. One of ordinary skill in the art would find it obvious to try adding a fixed guaranteed program price to the loyalty program system of McCall in an effort to further attract customers. McCall discloses in column 2, lines 58-end, that information relating to fuel discounts is used by the retailer *to develop new marketing strategies*. The retailer is disclosed as needing to know if a given incentive program is working or not in order to determine if that program should continue, *or if the purchase criteria should be changed* to attract a larger number of customers. McCall recognizes that one of ordinary skill in the art is going to try different programs and approaches and will try out differing purchase criteria to more or less fine tune the program to be as successful as it can be. One of ordinary skill in the art of marketing and incentive programs is a person with some level of creativity on their own. McCall Column 10, lines 1-7 also discloses the fact that the retailer is going to analyze the data relating to the discounts so as to *adjust the program specifics as needed*. One of ordinary skill in the art would find it obvious to provide a fixed guaranteed program price for fuel to the overall

incentive program of McCall in an effort to further attract customers and have a successful customer discount incentive program.

With respect to the claimed use of the "*program sponsor data*" and "*customer expected usage data*" to determine the guaranteed program price for fuel, this is considered to be obvious for the following reasons. To start with, any owner that sells fuel as McCall does, and that is looking at guaranteed price program such as disclosed by Infinity, is going to try to figure out as best they can, what the quantity of fuel is that the customers will purchase (their annual consumption), fuel type, as well as how much money is coming in from the third party that may be paying the "finders fee". One of ordinary skill in the art that is fixed guaranteed prices to customers is obviously going to take into account how much fuel the customers are going to be expected to purchase (their annual consumption), fuel type, and how much other money the third party is paying (finders fee) towards the customer discount so that the fuel owner in McCall can determine their cost to arrive at a guaranteed price. The expected amount of fuel to be purchased annually necessarily affects how much fuel the retailer is going to have to commit to, which is a huge financial responsibility. A retailer may obtain a bigger discount from their fuel provider if the overall amount of fuel to be purchased is greater. The retailer also needs to ensure they do not buy too much fuel that exceeds the total expected amount. The retailer must have some idea of the quantity of fuel that their customers are negotiating to buy before the price can be set, because the price you agree to sell the fuel at is directly related to and dependent on the price that the retailer has to pay to obtain the negotiated quantity of fuel as well as

how much the third party is paying for the finders fee. This is basic economics. This is also seen as the measuring of the demand for the discounted fuel (negotiated amount), and then using that demand information to calculate the fuel program price. It would have been obvious to one of ordinary skill in the art at the time the invention was made to take into account the quantity of fuel that the customer is expecting to purchase over the given amount of time (months) along with the program sponsor data (which is like income to the retailer because the retailer is not paying for the discounts because they are paid by the third party) to calculate the program price for the fuel that is being negotiated. The claimed data that applicant is using to figure out the program price is the kind of data that one of ordinary skill in the art would be naturally concerned with. How much fuel you are committing to provide to customers, the time period over which this is to occur, and any other income that will offset the effective purchase price of the fuel (such as the third party paid discount amount) are all things that one of ordinary skill in the art would naturally want to take into account when determining the program price for fuel. Once the program price is determined, one of ordinary skill in the art would have found it obvious to store the number. This is desirable because this price is the agreed upon price that you are selling fuel to the customer at, where the customer has negotiated a certain volume of purchases, so you would clearly want to have a record of what that agreed upon price is. That is considered to be obvious.

McCall does not disclose using the usage data and sponsor fee amount (data related to a fee to be paid by a third party) to develop *a financial hedging strategy* that can diminish the risk associated with the volatility of fuel prices.

The "Weather futures" article discloses the well-known concept of looking to the future to help protect against unnecessary losses due to factors that could be predicted to some extent. The article discloses that a natural gas company can "hedge" itself against lost revenues if a warm winter cuts sales. A hedging strategy for fuel is very old and well known, for example the futures market for oil, which helps reduce the risk due to changing fuel prices and market changes**. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the customer expected usage data and the program sponsor "finder fee", as well as any other data deemed as necessary or relevant data, to develop a financial hedging strategy to help prevent foreseeable losses due to changing demand and fuel prices.** In the fuel market, any kind of extreme weather changes, or changes due to OPEC, impact the prices in the fuel markets. Developing a strategy that can predict upcoming conditions in the market so that you don't offer too low of fuel prices for the incentive program can protect against losses when the price for fuel goes up considerably and you are taking losses due to too liberal of an incentive program.

With respect to the limitation that recites that the calculating step is done by a "processor", the use of a processor is not explicitly disclosed in the prior art to arrive at the "guaranteed delivery price" that has been provided to McCall (which is the claimed fixed guaranteed program price). The claimed processor could be simply a person using a calculator to do some mathematical calculations to arrive at a final price. The term "processor" is broad and arguably could be a person. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a

"processor", which can simply be a hand held calculator to calculate the guaranteed program price. Also, another interpretation is that a person is the claimed "processor" and that a manually arrived at price calculated by a person satisfies what is claimed. The prior art arrives at a guaranteed program price as is claimed, and it had to be calculated somehow.

For claim 55, in addition to that immediately above, **the claimed step of "determining a market indicator relevant to the future price"** is what you do when you are developing a financial hedging strategy involving the sale of fuel. You are inherently looking to market indicators that are relevant to the future price for the fuel.

For claims 38,65,115, not disclosed is that the expected usage data includes a geographic region as claimed (cl. 115) and where multiple *prices are calculated for multiple geographic regions*. Because many gas stations are franchises that are located over many geographical areas, and in view of the very well known fact that gas prices vary by geographic region (California prices are higher than Virginia prices), it would have been obvious to one of ordinary skill in the art at the time the invention was made for a franchise owner (fuel provider) to obtain information on the usage area (which is broad enough it can be considered as the individual retailer location of McCall) and to calculate program prices for multiple geographic regions as claimed. If the retailer has a chain of stores that are location in different geographical locations, it would have been obvious to have different program prices because the price of the vehicle fuel is not going to be the same for all of the regions. It then follows that when

developing the hedging strategy one would also take into account geographic factors that relate to the price of fuel.

With respect to claims 39,66, not disclosed is that the hedging strategy includes *purchasing futures for fuel*. The idea of purchasing "futures" in the fuel market is notoriously old and well known, and official notice is taken. This is also disclosed in the infinity reference. This is a way to try to predict what the market price for fuel is going to be in the future, hence the name "futures". It would have been very obvious to one of ordinary skill in the art at the time the invention was made to have the hedging strategy include "futures" purchases as is well known in the art as a way to protect one from predicted rising prices for fuel.

With respect to claims 40,67, in the rejection of record the resulting guaranteed program price is going to be a price that is discounted when compared to a current price. That is what is meant by offering a discounted price, a price less than normal. Providing a fixed guaranteed program price for fuel as is set forth in the rejection is resulting in a discount to a non program price. Any guaranteed program discounted price is some percentage lower than the non program price. This fact is inherent to any two different prices, one price is a certain percentage lower than the other price.

With respect to claims 41,68, a capped price is still just a price. The program price of the prior art rejection is a capped price because that is the agreed upon price that a given quantity of fuel is to be sold at. This satisfies what is claimed.

3. Applicant's arguments filed 2/18/09 have been fully considered but they are not persuasive.

With respect to applicant's general allegation that the examiner has failed to consider any of the claims and their claimed limitations, this is disagreed with by the examiner. Applicant argues that for claims 31,55,61, and 115, that "No limitations are discussed for any of the claims mentioned.". This is not agreed with at all by the examiner because each and every claim limitation is specifically and clearly addressed in the rejection of record. The examiner has used the claim language in the analysis of the prior art and the examiner is at a loss as to why applicant does not appear to be able to understand the position of the examiner. The argument that the rejection is not understood is not a persuasive type of argument; the rejection must be addressed on the merits.

With respect to the argument that the claims are impermissibly grouped together by the examiner and that this renders applicant unable to understand the rejection, this kind of argument has no merit and is not persuasive. This argument does not touch on the merits of the rejection of record.

With respect to the argument concerning the "Infinity" reference and claim 115 as an example, applicant is essentially arguing that because the examiner has not written the rejection how the applicant wants it written as far as format goes, that the rejection is somehow flawed. This is not persuasive. The continued argument that “we do not understand the rejection" is not persuasive. For claim 115 and the geographic region

limitation that applicant stated has not been addressed by the examiner, the examiner refers applicant to the rejection of record where claim 115 was addressed as follows:

"*For claims 38,65,**115.** not disclosed is that the expected usage data includes a **geographic region as claimed (cl. 115)** and where multiple prices are calculated for multiple geographic regions. Because many gas stations are franchises that are located over many geographical areas, and in view of the very well known fact that gas prices vary by geographic region (California prices are higher than Virginia prices), it would have been obvious to one of ordinary skill in the art at the time the invention was made for a franchise owner (fuel provider) to obtain information on the usage area (which is broad enough it can be considered as the individual retailer location of McCall) and to calculate program prices for multiple geographic regions as claimed. If the retailer has a chain of stores that are location in different geographical locations, it would have been obvious to have different program prices because the price of the vehicle fuel is not going to be the same for all of the regions. It then follows that when developing the hedging strategy one would also take into account geographic factors that relate to the price of fuel.*"

Applicant has argued that claim 115 in total, and the geographic area limitation specifically has been ignored and not treated by the examiner. Applicant's statements are simply not true as this limitation has been addressed by the examiner as is evidence by the current and prior office action rejections. It is not understood how applicant can state that claim 115 has not been addressed at all when the rejection of record clearly has this limitation addressed.

Applicant states in general that nothing that has been claimed is addressed by the examiner. This is not addressing the rejection of record and is not addressing the application of the prior art references as set forth by the examiner. Applicant has to address the prior art and the position taken in the rejection. As far as the argument that the office action fails to state why the claimed invention is considered to be obvious, the examiner disagrees. Upon reading the office action, a reasonable person would have no problem understanding what the position of the examiner is and why the claims are considered to be obvious.

With respect to the argument that McCall does not disclose a finder's fee as claimed, the argument is not persuasive. With respect to the finder's fee limitation, the examiner has stated that:

"*The claimed receiving of "program sponsor data that includes an amount of a finder's fee paid by a program sponsor" is considered to be the discount amount that the customer is entitled to for the some various programs discussed by McCall, that is disclosed as being paid or subsidized by a third party (a program sponsor). With respect to the language about the fee being paid by a program sponsor, applicant is referred to column 12, lines 19-30, where it is disclosed that "Pertaining to the discounts, a variety of arrangements are contemplated. Some examples entail the funding of the discount or reward by third parties other than the supplier of petroleum". If a third party is funding the discount, the fee that they pay can very reasonably be considered a "finder's fee". The discounted amount for fuel purchases is paid to the*

program operator by the program sponsor (the third party) to more or less subsidize the discount that is given to the customer."

Applicant has simply argued that McCall does not disclose the amount of a finder's fee paid by a program sponsor while ignoring the above quoted portion of the rejection where the examiner explains how McCall satisfies what is claimed. Applicant's argument is not persuasive and is ignoring the rejection of record. The examiner has stated how this limitation was satisfied by the prior art and the applicant has not even addressed this at all. The argument is not persuasive.

With respect to claims 31 and 55, applicant has argued that McCall does not disclose the guaranteed fixed program price. This limitation was taught in the "Infinity" reference and applicant cannot attack the prior art combination by attacking just the primary reference to McCall. Clearly McCall does not disclose what is claimed because the examiner stated such, and used a secondary reference in the 103 rejection. Applicant is not addressing the rejection of record which is a 3 way 103 prior art rejection, not just a 103 in view of McCall alone.

With respect to the limitation about the financial hedging strategy to diminish risk, applicant argues that McCall does not disclose this limitation. The examiner agrees. That is why the 3rd reference in the 103 rejection was used (the "Weather futures..." article) that shows the desirability of developing a hedging strategy.

With respect to the argument regarding the use of the finder's fee to develop the hedging strategy, this limitation has been addressed by the examiner. If a 3rd party is paying a finder's fee (as is done in McCall), that is income that would be obviously taken

into account by a person developing a overall financial hedging strategy. This is an monetary amount that will offset the total price paid for fuel, so to take into account the finder's fee in the overall hedging strategy is something that would have been obvious to one of ordinary skill in the art, as well as other data that is relevant to the business at hand. McCall does not need to mention risk or a hedging strategy for the examiner to conclude that it is obvious.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dennis Ruhl whose telephone number is 571-272-6808. The examiner can normally be reached on Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Janice Mooneyham can be reached on 571-272-6805. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Dennis Ruhl/
Primary Examiner, Art Unit 3689